

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

In re MGM MIRAGE SECURITIES  
LITIGATION

Case No.: 2:09-cv-01558-GMN-VCF

**ORDER**

Pending before the Court is Defendants MGM Resorts International (“MGM”), James J. Murren (“Murren”), Daniel J. D’Arrigo (“D’Arrigo”), and Robert C. Baldwin’s (“Baldwin”) (collectively, “Defendants”) Motion to Dismiss (ECF No. 170) and Lead Plaintiffs Arkansas Teacher Retirement System, Philadelphia Board of Pensions and Retirement, Luzerne County Retirement System, and Stichting Pensioenfonds Metaal en Techniek (collectively, “Plaintiffs”) Motion to Strike (ECF No. 186). The Court has considered the Responses and Replies to the respective Motions. For the reasons below, Plaintiffs’ Motion is denied, and Defendants’ Motion is denied.

**I. BACKGROUND**

This is a class action brought on behalf of purchasers of MGM securities between August 2, 2007 and March 5, 2009 (the “Class Period”). (ECF No. 1.) MGM owns and operates large casino resorts, primarily in Las Vegas, Nevada. (*Id.* at ¶ 16.) Defendants Murren, D’Arrigo, and Baldwin (the “Individual Defendants”) were high ranking officers and directors of MGM who allegedly made false or misleading statements to the public to artificially inflate the price of MGM stock during the class period. (*Id.* at ¶ 17-20.) Plaintiffs’ allegations center on MGM’s undertaking and management of the CityCenter project, “the largest privately developed construction project in the western hemisphere.” (*Id.* at ¶ 26.)

The following allegations are contained in the Complaint. Throughout the Class Period,

1 Defendants made false and misleading statements relating to CityCenter's progress, and how  
2 that affected MGM's fiscal health during the financial crisis. On multiple occasions, Defendants  
3 represented that CityCenter's construction was proceeding both on-budget and on-schedule.  
4 (*See, e.g., id.* at ¶¶ 45, 91, 97, 131.) Yet, the design of the project was constantly changing, and  
5 construction was plagued with defects and failed inspections. (*See, e.g., id.* at ¶¶ 48-52, 107-08,  
6 116.) These construction flaws culminated in a significantly scaled back design and delayed  
7 completion date of the Harmon building, a major component of CityCenter. (*Id.* at ¶ 140)  
8 Additionally, Defendants made multiple assurances that MGM was financially stable and had  
9 ample access to the financing needed to complete CityCenter. (*See, e.g., id.* at ¶¶ 53, 55, 68, 83,  
10 87, 95, 101, 114, 119.) These statements were made in the face of constricting credit markets,  
11 declining cash flow, increased construction costs at CityCenter, and creditors' increasing  
12 unwillingness to finance projects in Las Vegas. (*Id.* at ¶¶ 56, 112). These statements artificially  
13 inflated the price Plaintiffs paid for MGM stock, and when the truth became known, MGM's  
14 stock rapidly decreased in value. (*Id.* at ¶ 175.) The Complaint also contains allegations that  
15 Defendant Baldwin sold stock after the misrepresentations were made, thereby collecting on the  
16 inflated value. (*Id.* at ¶¶ 20, 66, 76, 195.)

17 Plaintiffs brought this action for violations of § 10(b) of the Securities Exchange Act of  
18 1934 (the "Exchange Act") and its corresponding Rule 10b-5 against all Defendants, and for  
19 control person liability under § 20(a) of the Exchange Act against the Individual Defendants.  
20 The Court determined that the initial complaint failed to state a claim due to its puzzle-like  
21 pleading, but granted Plaintiffs leave to amend. (ECF No. 151.) Plaintiffs then filed their First  
22 Amended Complaint (the "Complaint"), which Defendants now seek to dismiss. Defendants  
23 argue that the Complaint fails to adequately allege (1) actionable false or misleading statements,  
24 (2) that any statements were made with scienter, and (3) that the statements were the cause of  
25 Plaintiffs' loss. Defendants also argue that the Complaint fails to adequately plead control

1 person liability as no underlying violation of the securities laws is properly pled.

2 Along with their Motion, Defendants filed a request for judicial notice of a number of  
3 documents filed with the SEC and historical stock price information relating to MGM, its  
4 competitors, and the entire market. (ECF No. 172). Plaintiffs object to the submission of the  
5 documents as premature to this stage of the litigation and moved to strike Defendants' request.  
6 (ECF No. 186.)

## 7 **II. LEGAL STANDARD**

### 8 **A. Motion to Dismiss**

9 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief  
10 can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "a short and  
11 plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.  
12 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A district court must accept as  
13 true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled  
14 to the assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Mere recitals of the  
15 elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at  
16 678.

17 While Rule 8 does not require detailed factual allegations, it demands "more than labels  
18 and conclusions" and "[f]actual allegations must be enough to rise above the speculative level."  
19 *Twombly*, 550 U.S. at 555. To survive a motion to dismiss, a complaint must contain sufficient  
20 factual matter to "state a claim to relief that is plausible on its face." *Id.* at 570. When the claims  
21 in a complaint have not crossed the line from conceivable to plausible, the complaint must be  
22 dismissed. *Id.*

### 23 **B. Pleading Requirements for Securities Actions**

24 Section 10(b) of the Exchange Act makes it unlawful "[t]o use or employ, in connection  
25 with the purchase or sale of any security . . . any manipulative or deceptive device or

1 contrivance in contravention of such rules and regulations as the Commission may prescribe.”  
2 15 U.S.C. § 78j(b). Pursuant to this section, the SEC promulgated Rule 10b–5, which makes it  
3 unlawful “[t]o make any untrue statement of a material fact or to omit to state a material fact  
4 necessary in order to make the statements made, in the light of the circumstances under which  
5 they were made, not misleading.” 17 C.F.R. § 240.10b–5(b).

6 As with all claims based on fraud, a plaintiff alleging violations of § 10(b) and Rule 10b-  
7 5 must also comply with Fed. R. Civ. P Rule 9(b), which requires that “the circumstances  
8 constituting fraud or mistake . . . be stated with particularity.” This rule requires that claims of  
9 fraud be accompanied by the “who, what, when, where, and how” of the conduct charged, *Vess*  
10 *v. Ciba-Geigy Corp., USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting *Cooper v. Pickett*, 137  
11 F.3d 616, 627 (9th Cir. 1997)), so that the complaint does not simply “lump multiple defendants  
12 together.” *Destfino v. Reiswig*, 630 F.3d 952, 958 (9th Cir. 2011). This requirement ensures that  
13 the defendants are on “notice of the particular misconduct . . . so that they can defend against the  
14 charge and not just deny that they have done anything wrong.” *Vess*, 317 F.3d at 1106.

15 Additionally, Congress passed the Private Securities Litigation Reform Act (“PSLRA”)  
16 imposing an even higher pleading standard on plaintiffs in securities fraud cases. The PSLRA  
17 requires that a complaint must “specify each statement alleged to have been false or misleading,  
18 the reason or reasons why the statement is misleading, and, if an allegation regarding the  
19 statement or omission is made on information and belief, the complaint shall state with  
20 particularity all facts on which that belief is formed.” 15 U.S.C. § 78u-4(b)(2). Further, where  
21 recovery is dependent on a showing that defendant acted with a particular state of mind, “the  
22 complaint shall, with respect to each act or omission alleged . . . state with particularity facts  
23 giving rise to a strong inference that the defendant acted with the required state of mind.” *Id.*  
24 For § 10(b) actions, the required state of mind is “knowing” or “intentional” conduct or  
25 “deliberate recklessness.” *S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 782 (9th Cir. 2008).

1 To avoid dismissal of a claim for relief under § 10(b), plaintiffs must allege (1) defendant  
2 made a material misrepresentation or omission, (2) with scienter or intent to defraud, (3) in  
3 connection with the purchase or sale of a security, (4) plaintiff relied on that misrepresentation,  
4 (5) plaintiff suffered economic loss, and (6) that loss was caused by the misrepresentation or  
5 omission. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005). When ruling on a  
6 motion to dismiss, the Court may take into account matters of public record, any exhibits  
7 attached to the complaint, and any documents referred to therein. *See Dreiling v. Am. Exp. Co.*,  
8 458 F.3d 942, 946 n.2 (9th Cir. 2006) (in evaluating a motion to dismiss under Rule 12(b)(6), a  
9 court “may consider documents referred to in the complaint or any matter subject to judicial  
10 notice, such as SEC filings”).

### 11 **III. DISCUSSION**

#### 12 **A. Motion to Strike**

13 Because a portion of Defendants’ Motion to Dismiss relies upon information presented in  
14 their request for judicial notice, the Court will initially address the request and Plaintiffs’  
15 corresponding Motion to Strike. Under Rule 12(f) a “court may strike from a pleading ... any  
16 redundant, immaterial, impertinent, or scandalous matter.” Rule 7(a) identifies pleadings as the  
17 complaint, answer, and reply, but not motions and other papers. *See Fed. R. Civ. Pro. 7(a)*.  
18 Thus, a motion to strike is limited to pleadings. *United States v. Crisp*, 190 F.R.D. 546, 550–51  
19 (E.D. Cal. 1999) (citing *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983)).  
20 There is no provision in the Federal Rules of Civil Procedure for motions to strike another  
21 motion or memoranda. *See id.* However, a motion to strike matters that are not part of the  
22 pleadings may be regarded as an invitation by the movant to consider whether proffered material  
23 may properly be relied upon. *Id.* Thus, the Motion to Strike is denied as procedurally flawed,  
24 but the Court will consider Plaintiffs’ opposition to the request for judicial notice.

25 Under Fed. R. Evid. 201, a court may take judicial notice of facts that “can be accurately

1 and readily determined from sources whose accuracy cannot reasonably be questions.” Courts  
2 have held that SEC filings and historical stock price information qualify as judicially noticeable.  
3 *In re Amgen Inc. Sec. Litig.*, 544 F. Supp. 2d 1009, 1023-24 (C.D. Cal. 2008). Where a party  
4 has requested judicial notice and provided the necessary information, the Court must take  
5 judicial notice. Fed. R. Evid. 201(c)(2).

6 Defendants request judicial notice of twenty-five exhibits. Exhibits 1-10 are proxy  
7 statements, Form 10-Ks, and Form 4s filed by MGM with the SEC. These documents are  
8 judicially noticeable, and the Court takes notice of them to the extent that they are admissible  
9 and accurately reflect information in the public record. Exhibits 11-24 are historical stock prices  
10 as recorded by Yahoo! Finance<sup>1</sup> of MGM, MGM’s competitors, and the S&P 500. The Court  
11 takes judicial notice of this information to the extent it is relevant and admissible. Exhibit 25 is  
12 a copy of the transcript of MGM’s February 21, 2008 earnings call referenced in the Complaint.  
13 This document is not a part of the public record and not judicially noticeable, but the Court may  
14 consider it under the incorporation by reference doctrine. *See United States v. Ritchie*, 342 F.3d  
15 903, 908 (9th Cir. 2003).

16 Nevertheless, although the Court has taken judicial notice of the documents, the Court  
17 agrees with Plaintiffs that the Defendants’ arguments based on these documents are premature.  
18 Defendant relies on the proffered documents to support their arguments that Defendant  
19 Baldwin’s stock transactions were part of his regular trading practices and that the decline in the  
20 price of MGM’s stock was not as a result of revealed truth following misstatements, but rather a  
21 systemic decline in stock prices across the gaming industry and the market generally.<sup>2</sup> (ECF No.

---

22  
23 <sup>1</sup> Courts have relied on Yahoo! Finance for accurate historical pricing of stocks. *See, e.g., Siemers v. Wells Fargo & Co.*, No. C 05-04518 WHA, 2007 WL 1456047, at \*2 (N.D. Cal. May 17, 2007).

24 <sup>2</sup> Defendants also argue that the earnings call transcript shows that the statements made, at least in one earnings  
25 call, were accompanied by cautionary language. However, as discussed below, many of the alleged statements  
are not forward-looking, and do not qualify for the safe harbor regardless of any accompanying language.  
Further, any forward-looking statement known to the speaker to be false or misleading when made must be  
accompanied by cautionary language so indicating.

172.) The information in the exhibits does not definitively compel this conclusion, but rather only tend to support Defendants' competing inference. Thus, although the information is evidence relevant to proving a viable defense for Defendants, the presentation of such evidence is not proper on a Motion to Dismiss.

### **B. Material Misrepresentations or Omissions**

To adequately plead a misrepresentation or omission, a plaintiff must allege specific facts showing either (1) a false statement of material fact, or (2) an omission of material fact that renders other statements misleading. *See In re VeriFone Sec. Litig.*, 11 F.3d 865, 868 (9th Cir. 1993). Additionally, a statement that is technically true, may still be misleading and actionable under securities laws where it "affirmatively create[s] an impression of a state of affairs that differs in a material way from the one that actually exists." *Brody v. Transitional Hosp. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002). However, statements that are merely incomplete are not actionable. *Id.* The complaint must adequately explain why the statement or omission is misleading, and allege that the statement or omission was false or misleading when made. *In re Stac Electronics Securities Litigation*, 89 F.3d 1399, 1404 (9th Cir. 1996).

Plaintiffs' Complaint contains numerous allegedly actionable statements made by Defendants. Those statements generally can be sorted into three categories: Statements regarding MGM's financial status and access to credit financing, statements that CityCenter was on budget, and statements that CityCenter was on schedule.

#### *1. Statements regarding financial security and access to credit*

The Complaint contains several alleged statements regarding the financial well-being and how that affected its ability to obtain additional financing for CityCenter. Plaintiffs allege that Defendants represented on several occasions the company was financially sound, with a good balance sheet and strong cash flows. Defendants allegedly further represented that these characteristics gave MGM ample flexibility in credit markets to obtain additional financing for



1 CityCenter because it was uniquely positioned such that potential lenders were approaching  
2 MGM to provide financing. Additionally, Plaintiffs allege that Defendants represented their  
3 partnership with Dubai World “evaporated” risk. Plaintiffs allege that these statements were  
4 misleading because MGM faced tightening credit markets and it was increasingly difficult to  
5 secure financing for Las Vegas projects. Moreover, Plaintiffs allege that MGM’s cash flows  
6 were shrinking and CityCenter’s costs were constantly increasing. Thus, MGM’s credit  
7 worthiness was deteriorating, only exacerbating its predicament.

8 Defendants argue that these allegations are insufficient to show falsity because first, the  
9 Complaint never alleges MGM was unable to attain financing and second, even if the financial  
10 outcome of the company did not turn out as expected, the statements were inactionable, overly-  
11 optimistic predictions about future economic events. However, taking all well pled facts as true,  
12 Defendants arguments mischaracterize the allegations. First, Plaintiffs do not allege that their  
13 harm was caused by MGM’s inability to finance CityCenter. Rather, the alleged harm was that  
14 the revelation that MGM had maxed out its borrowing capacity under its senior credit facility  
15 caused its stock price to plummet. In other words, the revelation of Defendants’ *inflexibility*  
16 caused the harm. Thus, Defendants statements regarding its financial health providing it  
17 flexibility and optionality with respect to financing were misleading because they created an  
18 impression of sound fiscal footing that materially differed from the actual financial state of the  
19 company.

20 Second, Defendants improperly trivialize the content of the alleged statements.  
21 Statements about how a company’s financial status affects its ability to finance its operations  
22 moving into the future are not vague, corporate optimism that investors should know to ignore.  
23 *See In re Syntax Corp. Sec. Litig.*, 855 F. Supp. 1086, 1095 (N.D. Cal. 1994), *aff’d* 95 F.3d 922  
24 (9th Cir. 1996) (holding such statements as “we’re doing well,” “we have a great future,”  
25 “business will be good,” and “everything is clicking,” as non-actionable). Further, the alleged



1 statements were not projections about the future, but about the present financial state and access  
2 to financing of MGM. Finally, the Complaint alleges that, at the time the statements were made,  
3 Defendants were aware of the facts that undermined their veracity. Consequently, the complaint  
4 adequately alleges actionable misleading statements.

5           2. *Statements that CityCenter was on-budget*

6           The Complaint also contains several of Defendants' statements that the CityCenter  
7 project was "on-budget." Plaintiffs allege that at the beginning of the Class Period, the  
8 estimated budget for the project was \$7.4 billion, and this estimate was reaffirmed in statements  
9 by the Defendants. Later, Defendants revised the estimate up to \$7.8 billion, stating that the  
10 increase was due to "the complexity of the hotel casino podium, the fair buildings, and the  
11 Libeskind-designed roof structure over the crystals retail area, which required additional steel,  
12 concrete and fabrication, along with additional design changes for exterior lighting and water  
13 features and site utility costs." The budget was again revised upward to \$8.1-\$8.4 billion, but  
14 Defendants represented that they had guaranteed maximum price ("GMP") contracts in place  
15 with most general contractors. This budget was later reaffirmed and Defendants represented that  
16 approximately 75% of the GMP contracts were in place. The Complaint details several  
17 statements where the last estimate was reaffirmed.

18           Plaintiffs claim that these statements were misleading because the publicly announced  
19 budget at the beginning of Class Period—as well as each subsequent upward revision—was  
20 purposefully and grossly under-estimated. Plaintiffs allege that MGM manipulated the  
21 construction budget by reducing the construction estimates it had received by 20%, using cost-  
22 estimate methods not customary for the industry, and arbitrarily cutting millions of dollars off  
23 the total budget. Further, Plaintiffs allege that the GMPs represented as a method of keeping  
24 costs to a minimum, actually provided for liberal cost increases due to design changes and rush  
25 orders. Plaintiffs also allege that the design of CityCenter was being changed on a near daily

1 basis, requiring crews to tear down and rebuild parts of the project, as well as increasing the  
2 quantity, an often quality, of materials used. Thus, Plaintiffs allege that at the time Defendants  
3 made the various statements that CityCenter was on-budget, Defendants knew or should have  
4 known that publicly announced budget was grossly underestimated, and that the actual costs  
5 would necessarily exceed the budget. Plaintiffs also allege that each upward revision on the  
6 budget was similarly known to Defendants to be underestimated and not representative of the  
7 actual costs entailed in CityCenter's development.

8 In the Motion, Defendants argue that although their initial estimates were inaccurate, they  
9 were not fraudulent. Defendants claim that Plaintiffs' allegations are similar to those in *In re*  
10 *Stratosphere Corp. Sec. Litig.*, No. CV-S-96-708-PMP, 1997 WL 581032, at \*15 (D. Nev. May  
11 20, 1997). In *Stratosphere*, the plaintiffs alleged "that because cost overruns eventually  
12 occurred," the defendants "must have known that they existed at the time of the allegedly false  
13 statements." *Id.* However, the court disagreed, holding that inaccurate projections do not  
14 necessarily involve fraud, and "fraud by hindsight" is insufficient to meet the heightened  
15 pleading standard. *Id.* (citing *In re Syntex Sec. Litig.*, 95 F.3d 922 (9th Cir. 1996); *In re*  
16 *VeriFone Sec. Litig.*, 11 F.3d 865, (9th Cir. 1993).

17 There are significant differences, however, between Plaintiffs' allegations and those in  
18 *Stratosphere*. In *Stratosphere*, the plaintiffs simply alleged that the company had admitted to  
19 cost overruns. There were no allegations of what the defendants knew at the time the statements  
20 were made. Consequently, the inference was simply that the projections did not clearly predict  
21 future events accurately. Here, however, Plaintiffs have alleged that Defendants based their  
22 estimations on essentially falsified information. Thus, even though an estimate is a future  
23 projection, Defendants statements were misleading because, at the time the statement was made,  
24 Defendants knew the estimate was not accurate and that actual costs were reasonably expected  
25 to exceed the stated budget. The Complaint adequately alleges false statements in relation to

1 CityCenter's on-budget status.

2 3. *Statements that CityCenter was on-schedule*

3 The Complaint also contains many statements by Defendants relating to the fact that  
4 "construction [of CityCenter was] progressing nicely," and the project was "on track for a late  
5 2009 opening." Plaintiffs allege that these statements were false because of the constant  
6 modification of the design and pervasive flaws in both the design and construction of the  
7 project. Problems with the rebar installation at the Harmon threatened the building's structural  
8 integrity, one of the floors at another building was "floating" and required significant repairs,  
9 and the concrete pour at another building was "screwed up." Plaintiffs allege that Clark County  
10 building safety inspectors had issued several Non-Compliance Reports and notices of violation,  
11 and had even threatened to shut down all construction at the site. Thus, Plaintiffs argue that  
12 Defendants knew, at the time the statements were made, that the project could not be completed  
13 on time.

14 Defendants argue that these statements were not false because CityCenter was completed  
15 on time and opened in November of 2009 as planned. Indeed, the Complaint lacks any  
16 allegation that CityCenter did not open in late 2009 as stated. However, the completion and  
17 opening of CityCenter was only with the significant modification and postponed opening of the  
18 Harmon building. This omission would certainly be material as it significantly altered the  
19 "total mix" of information available. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-23 (1988).  
20 Thus, to the extent that Defendants knew that the Harmon building could not be completed, but  
21 nevertheless represented that the construction was proceeding on schedule, the omission of plan  
22 changes to the Harmon would make any on-schedule statement misleading.

23 Defendants also argue that the statements are not actionable because they simply  
24 recommend predictions about the project completion date. Defendants argue that under  
25 *Visionquest CHC, LLC v. Buchholz*, No. C-08-3410 RMW, 2008 WL 5048414, at \*1 (N.D. Cal.

1 Nov. 24, 2008), estimations for completion are not actionable because “real-estate development  
2 projects are commonly subject to construction delays.” However, Defendants’ reasoning is  
3 flawed for the same reasons as their *Stratosphere* argument. In *Visionquest*, the plaintiff alleged  
4 nothing more than the statements of the defendant. In contrast, Plaintiffs have alleged that at the  
5 time the statements were made, Defendants knew of the unfinished design, failed inspections,  
6 and construction defects that the project, particularly the Harmon building, was facing. Viewing  
7 all well-pled allegations as true, the allegations that statements regarding CityCenter proceeding  
8 on-schedule were misleading are adequately pled.

### 9 C. Safe Harbor

10 Defendants argue that any statements that could be considered false are still inactionable  
11 as they fall within the PSLRA’s safe harbor for forward-looking statements. The safe harbor  
12 protects “forward-looking statement[s]” that are “accompanied by meaningful cautionary  
13 statements identifying important factors that could cause actual results to differ materially from  
14 those in the forward-looking statement[s].” 15 U.S.C. § 78u-5(c)(1)(A)(i). Defendants argue  
15 that their statements about the budget and schedule of CityCenter were future projections, and  
16 that all statements were accompanied by cautionary language.

17 However, statements that a project is “on-track,” “on-budget,” or “on-schedule,” are not  
18 forward-looking but statements relating to *current* conditions. See *In re Secure Computing*  
19 *Corp., Sec. Litig.*, 184 F. Supp. 2d 980, 990 (N.D. Cal. 2001). Thus, many of the statements  
20 alleged are not forward-looking at all. Further, to the extent that some statements alleged in the  
21 Complaint were expressed in terms of future expectations or estimations, the Complaint also  
22 alleges that those statements were misleading because of the omission of material facts presently  
23 known to the speaker. When a defendant makes a forward-looking statement with actual  
24 knowledge that it is false or based on faulty information, any cautionary language must include  
25 the speaker’s belief of the projections falsity, or explanation of the reasons the statement is false

1 or misleading, to qualify for the safe harbor. *Rosenbaum Capital, LLC v. McNulty*, 549 F. Supp.  
2 2d 1185, 1190 (N.D. Cal. 2008) (citing *In re SeeBeyond Tech. Corp. Sec. Litig.*, 266 F.Supp.2d  
3 1150, 1165 (C.D.Cal. 2003)). Consequently, MGM's cautionary language accompanying any  
4 forward-looking statements was not sufficient to qualify for the safe harbor because it did not  
5 include an explanation of the facts known to the speaker about the various problems with the  
6 CityCenter construction costs and schedule.

#### 7 **D. Scienter**

8 Defendants also argue that the Complaint lacks adequate allegations that any false  
9 statements were made with the requisite scienter. To plead scienter, a plaintiff must “state with  
10 particularity facts giving rise to a strong inference’ that defendants acted with the intent to  
11 deceive or with deliberate recklessness as to the possibility of misleading investors.” *Berson v.*  
12 *Applied Signal Tech., Inc.*, 527 F.3d 982, 987 (9th Cir. 2008). Courts must “accept all factual  
13 allegations in the complaint as true” and “must consider the complaint in its entirety. *Tellabs,*  
14 *Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). “The inquiry . . . is whether *all*  
15 of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether  
16 any individual allegation, scrutinized in isolation, meets that standard.” *Id.* at 322-23. Scienter  
17 is adequately alleged when “a reasonable person would deem the inference of scienter cogent  
18 and at least as compelling as any opposing inference one could draw from the facts alleged.” *Id.*  
19 at 324.

20 The Complaint contains sufficient allegations to support a strong inference that  
21 Defendants acted with the intent to deceive or at least reckless disregard for the possibility of  
22 misleading investors. Defendants argue that scienter has not been adequately pled because  
23 (1) the Complaint does not adequately link allegations of scienter with the allegedly fraudulent

24 ///

25 ///

1 statements,<sup>3</sup> (2) the Individual Defendants retained a majority of their shares during the Class  
2 Period, (3) Baldwin's stock sales were consistent with regular trading practices, (4) the  
3 Complaint details continued work on the Harmon despite its allegations that Defendant's knew  
4 it was "doomed," and (5) other law suits, Sarbanes-Oxley Certificates, or the confidential  
5 witnesses do not create inferences of scienter. Defendants argue that the inference that  
6 Defendants expected to weather their financial problems is a more compelling inference than  
7 fraud.

8 However, Defendants grossly misapply the standard. Defendants improperly scrutinize  
9 individual allegations of scienter in isolation and while ignoring the main allegations dealing  
10 with scienter.<sup>4</sup> Taking all the allegations collectively and assuming them true, Defendants  
11 purposefully manipulated CityCenter's budget and made on-going misrepresentations in an  
12 effort to maintain the impression of progress and success while internally the problems with  
13 CityCenter and MGM's finances were known to be significant and only increasing. This is  
14 sufficient to plead scienter. Additionally, although Defendants present alternative explanations  
15 of their actions, Plaintiffs inference of scienter is cogent and at least as compelling as those  
16 Defendants present. Consequently, the Complaint adequately pleads scienter.

#### 17 **E. Loss Causation**

18 Finally, Defendants argue that the Complaint does not adequately allege that the  
19 misstatements complained of caused Plaintiffs' loss. To properly plead loss causation, "the  
20 plaintiff must demonstrate a causal connection between the deceptive acts that form the basis for  
21 the claim of securities fraud and the injury suffered by the plaintiff." *In re Daou Sys., Inc.*, 411  
22 F.3d 1006, 1014 (9th Cir. 2005). "The misrepresentation need not be the sole reason for the  
23 decline in value of the securities, but it must be a substantial cause." *In re Gilead Sciences Sec.*

---

24 <sup>3</sup> Defendants complain that the scienter allegations are poorly labeled as the word "scienter" only appears three  
25 times in the Complaint.

<sup>4</sup> Additionally, as explained above, Defendants rely on evidence not properly considered in a Motion to Dismiss.

1 *Litig.*, 536 F.3d 1049, 1056 (9th Cir. 2008) (internal quotations omitted). The complaint must  
2 provide “sufficient detail to give defendants ample notice of [plaintiff’s] loss causation theory,  
3 and to give some assurance that the theory has a basis in fact.” *Berson*, 527 F.3d at 989-90.

4 Plaintiffs adequately allege loss causation. The Complaint contains allegations that the  
5 revelation that MGM had reached its maximum borrowing capacity from its senior lending  
6 facility caused its stock price to fall 21.35%, that the revelation of significant cost overruns at  
7 CityCenter caused a 14.48% decline, and that the announcement that the Harmon building  
8 would be scaled back and the opening postponed caused a 9.02% drop in value. Plaintiffs also  
9 allege that each of these revelations was resulted in publications from analysts and downgrades  
10 from rating agencies which only resulted in further devaluation of MGM stock. This adequately  
11 puts Defendants on notice of Plaintiffs loss causation theory and provides some assurance that  
12 the theory has a factual basis.

13 Further, even though the Complaint details general economic turmoil, the Complaint still  
14 alleges that the misrepresentations were a substantial cause of the devaluation. In Plaintiffs’ loss  
15 causation allegations, the dates of the articulated stock price declines correspond with the dates  
16 of announcements by MGM, an analyst’s report relating to the alleged misrepresentations, or  
17 some specific market action in response to the announcement. Thus, although some of the price  
18 decline may have been a result of the general economic climate, the Complaint sufficiently  
19 alleges that Defendants’ misrepresentations were a sufficient cause.

20 Consequently, the Court finds that the Complaint has adequately stated a claim for  
21 violations of § 10(b) and Rule 10b-5. As Defendants’ sole objection to the control person  
22 liability claim is that no underlying violation was pled, the Court will not address the remaining  
23 requirements of the § 20(a) claim.

#### 24 **IV. CONCLUSION**

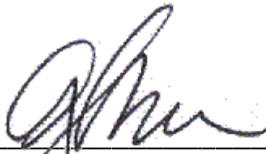
25 **IT IS HEREBY ORDERED** that Lead Plaintiffs Arkansas Teacher Retirement System,



1 Philadelphia Board of Pensions and Retirement, Luzerne County Retirement System, and  
2 Stichting Pensioenfonds Metaal en Techniek's Motion to Strike (ECF No. 186), is **DENIED**.

3 **IT IS FURTHER ORDERED** that Defendants MGM Resorts International, James J.  
4 Murren, Daniel J. D'Arrigo, and Robert C. Baldwin's Motion to Dismiss (ECF No. 170) is  
5 **DENIED**.

6 **DATED** this 26th day of September, 2013.

7  
8   
9 \_\_\_\_\_  
10 Gloria M. Navarro  
11 United States District Judge  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25